IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 5TH MARCH 2007 / 14TH PHALGUNA 1928

SA.No. 89 of 1993()

AS.169/1991 of SUB COURT, THALASSERY
OS.72/1988 of MUNSIFF COURT, THALASSERY
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:PLAINTIFF/RESPONDENT/APPELLANT

KALLIL THIRUVALIL ABDULLA HAJI
S/O.MOIDEENKUTTY, TRADER
RESIDING AT K.T.HOUSE,
PANOOR AMSOM, ELAMKODE DESOM
TELLICHERRY TALUK, CANNANORE.(DIED)

ADDL.APPELLANTS.
R2. THUNDIYIL ANDATHODAN AYISHA
W/O.K.T.ABDULLA HAJI
K.T.HOUSE, P.O. ELAMKODE
PALAKKOOL, TALLICHERRY TALUK
CANNANORE DT.
R3. -DO- MUHAMMADLI, S/O.K.T.ABDULLA HAJI, DO. DO.

R4. -DO- SUHARA, D/O.DO.DO.
R5. -DO- HAJIRA, D/O. -DO- -DO-
R6. -D0- SAHEEDA, D/O.-DO- -DO-
(ADDL. APPELLANTS 2 TO 6 ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF THE DECEASED 1ST APPELLANT VIDE ORDER DATED 22/12/93 ON CMP 1968/93.)

BY ADV. SRI.V.R.VENKITAKRISHNAN, N.C.JOSEPH

DEFENDANT/APPELLANT/RESPONDENT

EARAYINTAVIDE ANNERI KRISHNAN
S/O.KURUMBAN, RESIDING AT
PARAYINMEL HOUSE, P.O.ELANKODE
PANOOR, TELLICHERRY TALUK
CANNANORE DISTRICT.

BY ADV. SRI.T.A.RAMADASAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD

ON 5 /3 /2007 THE COURT ON 05/03/2007 DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 89 OF 1993

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Dated this the 5th day of March, 2007

JUDGMENT

Plaintiff in O.S. 72/88 on the file of Munsiff Court, Thalassery is the appellant. Appellant died subsequent to the filing of the appeal. Additional appellants 2 to 6 were impleaded as his legal heirs. Defendant therein is the respondent. Appellant instituted the suit seeking a decree for recovery of possession of plaint `B' schedule property and for permanent prohibitory injunction from trespassing into `A' schedule property excluding `B' schedule property and also to remove the bunk from the `B' schedule property. According to appellant, plaint `A' schedule property along with the remaining property originally belonged to Kallil Sooppi under Ext.A1 kuzhikanam deed executed by Ibrayi, the landlord Sooppi transferred his rights under Ext.B4 in favour of Aleema and thereafter Aleema transferred it in favour of

appellant under Ext.A2 assignment deed and appellant has been in possession of the entire extent of 12 six feet koles east west and 5 six feet koles north south. While so under Ext.A3 he created a wakf in favour of Kallummel @ Kalathil Prammal Palli on 26.10.68 in respect of 5 ½ x 5 six feet koles portion of that property. According to appellant, the remaining 2 ½ cents of the property was kept with him in his possession and it is the plaint A' schedule property. It was contended that while so respondent attempted to trespass into the property on 19.12.1987 and appellant filed a compliant before the Police and respondent undertook that he will not trespass into the property. It was alleged that thereafter on 28.2.88 respondent kept a bunk in the plaint `B' schedule property, which is part of the `A' schedule property, and he has no right over the plaint `B' schedule property and therefore appellant is entitled to recover possession of `B' schedule property after removing the bunk placed

therein by respondent. It was contended that as respondent is attempting to trespass into the remaining portion of plaint schedule property, he is also to be restrained by a decree for permanent prohibitory injunction.

2. Respondent in the written statement contended that from the description of the plaint `A' schedule property, it is seen that the property is in his possession and appellant has no manner of right or possession to the property. It was contended that plaint `A' schedule property has been in the direct possession of respondent and it is part of a contigous area in his possession and the footpath leading to his house on the north and it is a part of a vast area consisting of 1 acre 14 cents in survey Nos.R.S.25/2, 52/3, 53/3, 25/1 respectively which originally belonged to one Bavachi Haji and he leased out the whole plot including `A' schedule property having an extent of 1.14 acres to Kunhiraman, his uncle and Karumban the father of respondent as per Ext.B1 kuzhikanam

deed of 1940 and half right of Kunhiraman over the Kuzhikanam right was later purchased by Cheeru, the mother of respondent and `A' schedule property is part of the said property. It was also contended that after the death of Karumban father of respondent his half right devolved on his widow and children including respondent and as per registered partition deed 2485/65 properties were divided into five shares and item No.2 in the `D' schedule was allotted to respondent it includes plaint `A' schedule property and respondent assigned the western portion of property obtained under partition and being on the road side to K.C. Kunhiraman who put up a shop building therein and the eastern boundary shown in those documents is the plaint `A' schedule property in the possession of respondent and appellant is therefore not entitled to the decree sought for.

3. Learned Munsiff framed the necessary issues. On the side of the plaintiff, Exts.A1 to A9 and Exts.C1 to C4 were marked and Pws.1 to 3

were examined. On the side of defendant, Exts.B1 to B10 series were marked, Dws. 1 and 2 were examined. Learned Munsiff on appreciation of evidence found that Commissioner has correctly demarcated the property in Ext.C4 plan and plot `B' therein is the property covered under Ext.A3 wakf deed and plot `C' is the remaining portion of the property covered under Ext.A2, after creating Ext.A3 wakf deed and plaint `B' schedule property is portion of the said property where defendant put up a bunk and plaintiff is entitled to decree as prayed for. Defendant challenged the decree and judgment before Sub Court, Thalassery in A.S.169/91. Learned Sub Judge on reappreciation of evidence found that the recital in Ext.A3 that property which lies on the west of the property covered under Ext.A3 is retained by the appellant is a self serving recital which cannot be relied on. Learned Sub Judge after analysing the boundaries shown in the respective documents held that evidence of Pws. 1 to 3 is insufficient to

identify the property and though in Ext.C4 plan Commissioner has demarcated the properties plaintiff has not filed any objection and that Commission was taken out by defendant and in such circumstance plaintiff is not entitled to the decree sought for. Appeal was allowed and the decree granted by learned Munsiff was set aside and the suit was dismissed. The Second Appeal was filed challenging the decree of the first Appellate Court.

4. Second Appeal was admitted after formulating the following substantial question of law.

1) When there was no dispute as to the identity of the properties, whether first Appellate Court was justified in dismissing the suit on the ground that the properties have not been identified?

2) Whether on the evidence the finding of first Appellate Court that plaint schedule property was not identified is correct and if the properties

are not properly identified, was it justified in dismissing the suit without granting an opportunity to the plaintiff to establish the identity?

5. Learned counsel appearing for appellant and respondent were heard.

6. It is admitted case that properties which originally belonged to appellant under Ext.A2 and the property obtained by predecessor of respondent under Ext.B1 all originally belonged in jenm right to Aravilakathu Keloth Ibrayi. Appellant is claiming right and title under Ext.A1 kuzhikanam deed executed by Ibrayi in favour of Sooppi on 1.7.1943. The property was lying to the side of the northern road and described as 12 x 5, six feet koles. Ext.B1 kuzhikanam deed was later executed on 19.10.1940 in favour of Kunhiraman and Karumban the predecessors in interest of respondent. It has been specifically mentioned in Ext.B1 that an extent of 12 x 5, six feet koles of property which lies to the west of the property was not included in the kuzhikanam deed. That

property is the property covered under Ext.A1. The rights obtained by Sooppi under Ext.A1 was later assigned in favour of Aleema who in turn assigned it in favour of plaintiff under Ext.A2. It is not disputed that a portion of the property covered under Ext.A2 was later alienated by appellant under Ext.A3 wakf deed. Case of the appellant was that plaint `A' schedule property is the remaining 2 ½ cents of the property left with him after Ext.A3 alienation. Case of the defendant was that appellant did not have any property as plaint `A' schedule property and the property which lies to the west of the property, covered under Ext.A3 wakf deed, belongs to him and it is part of the property covered under Ext.B1. According to defendant, half right of Kunhiraman one of the tenants under Ext.B1 was assigned by him in favour of Cheeru mother of respondent and on the death of Karumban, the father, that right also vested on the mother and the children including respondent and they were divided under Ext.B6 partition deed

and plaint `A' schedule property is the portion of the property allotted to respondent under Ext.B6 partition deed.

7. The Commissioner in Ext.C4 plan identified plot `B' as the property covered under Ext.A3. The Commissioner has also identified plot `C' as the remaining property covered under Ext.A2 excluding the property alienated under Ext.A3. Learned Munsiff accepted the identification and finding that title to the property covered under Ext.A2 vests with appellant, granted the decree. Learned Sub Judge on analysing evidence found that property was not identified. Learned Sub Judge found that though the western boundary of the property covered under Ext.A3 was shown as the remaining property retained by appellant, the executant therein, that cannot be relied on as it is a self serving recital. Learned Sub Judge also found that appellant did not take out a commission and DW2 the Commissioner was appointed at the instance of the defendant and no petition was

filed to set aside Ext.C3 report and C4 plan and therefore on the available evidence held that properties were not identified.

8. On hearing learned counsel appearing for appellant and respondent, it is clear that learned Sub Judge failed to note that question of identity of the plaint `A' schedule property as such was not disputed in the written statement. No issue was also framed on that aspect. The proceeding paper of courts below shows that even Exts.C3 report and Ext.C4 plan were submitted by the Commissioner after part of the evidence was recorded and when the report was submitted, the defendant was found absent and an ex parte decree was granted, which was later set aside at the instance of the defendant as per order in I.A.1350/90 dated 27.5.91. It was thereafter defendant was examined and the suit was ultimately decreed. Though first Appellate Court has stated that appellant did not file an objection, it is seen from the records that on 2.7.91 an affidavit objecting to the report was

filed though not with regard to the identification. It is clear that even Exts.C3 report and C4 plan were submitted before the court only after completing the evidence on the side of plaintiff. The question is in such circumstance is whether first Appellate Court was justified in dismissing suit finding that property was not identified.

9. As is clear from the respective contentions the real dispute between the parties is with regard to identification of property. Both the plaintiff and defendant claimed under two kuzhikanam deeds Exts.A1 and B1. The property obtained by plaintiff under Ext.A2 is excluding the property transferred under Ext.A1 in favour of Sooppi which was transferred in favour of Aleema by Sooppi under Ext.B4 and purchased by plaintiff under Ext.A2. The right claimed by defendant is the right obtained by his uncle and father under Ext.B1 which was later partitioned between the legal heirs under Ext.B5 and obtained by defendant. Out of the property obtained by plaintiff under Ext.A2, he

alienated a portion of property covered under Ext.A3 and claims plaint `A' schedule property as the remaining property. According to defendant, plaint `A' schedule is not the part of property covered under Ext.A2 and instead it is part of the property covered under Ext.B1. Without identifying the property covered under Ext.A1 and B1 the real dispute between the parties cannot be resolved. Unfortunately no attempt was made by the parties to identify the property with reference to the title deeds. As the suit was filed for recovery of possession on the strength of title, burden is on the plaintiff to establish the title. Plaintiff could get a decree only on establishing that plaint `A' schedule property is a portion of the property covered under Ext.A2 and that could be established only on proving that plaint `A' schedule is part of the property obtained by Sooppi under Ext.A1 and left with plaintiff after alienating the property covered under Ext.A3. That question can only be effectively decided after

proper identification of the property covered under Ext.B1. When the question of identification was not considered by trial court and no issue was framed, learned Sub Judge should not have dismissed the suit after affording an opportunity to plaintiff to establish the identity. In such circumstance, in the interest of justice an opportunity is to be granted to the plaintiff to take out a commission and to identify the property.

Second Appeal is allowed. The decree and judgment passed by learned Sub Judge in A.S. 169/91 on the file of Sub Court, Thalassery is set aside. O.S.72/88 is restored to file and learned Munsiff is directed to dispose the suit after granting an opportunity to the plaintiff to establish the identity. It is made clear that plaintiff has to take out a commission and establish that plaint `A' schedule property is part of the property covered under Ext.A1 and not the property covered under Ext.B1 and plaint `A' schedule property is the remaining property left with him after execution of

Ext.A3 wakf deed. As the suit is of 1988, learned Munsiff has to dispose the suit as expeditiously as possible. Parties are directed to appear before the learned Munsiff on 28/3/07. Send back the records forthwith.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006